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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ERIC BELLIS, Plaintiff and Appellant, v. COUNTY OF SANTA CRUZ, Defendant and Respondent.	H026369 (Santa Cruz County Super. Ct. No. CV140607)

On May 13, 2000, while vacationing in the Seacliff Beach area of Aptos, plaintiff Eric Bellis and his wife walked to a local restaurant to have dinner. Sometime after 9:00 p.m., as the couple was walking back from the restaurant, plaintiff fell into a drainage ditch and broke his leg. Plaintiff sued the County of Santa Cruz (County) for maintaining a dangerous condition of public property. (Gov. Code, § 830 et seq.)[1] County moved for summary judgment arguing, among other things, that it was immune from liability under section 830.6, the design immunity defense. The trial court granted the motion and plaintiff appeals from the ensuing judgment. We shall affirm.

I. FACTS

Plaintiff and his wife dined at the Britannia Arms restaurant and left around 9:00 p.m. to walk back to the beach house in which they were staying. Plaintiff had visited the

[1]Unless otherwise specified, all further statutory references are to the Government Code.

same vacation home fewer than five times in the past. He had never previously walked along the route that took him to and from Britannia Arms that night.

Plaintiff and his wife walked single-file, uphill along the left shoulder of Seacliff Drive. This portion of Seacliff Drive has no streetlights or sidewalks. Plaintiff walked to the left of the white limit line along the paved shoulder, which he estimated to be about three feet in width. The hillside next to the road was separated from the shoulder by an asphalt concrete berm. There was a gap in the berm of about 10 feet at about the place where a drainage inlet box and its associated drainage ditch were located. This gap in the berm was necessary to allow surface water to pass from the roadway into the drain.

Although it was dark and plaintiff did not have a flashlight, it was light enough for him to see the white line marking the shoulder, the berm that ran along the left edge of the shoulder, and the drainage inlet box further to the left. He also noticed a white reflective paddle marking the location of the drainage inlet box. Plaintiff does not recall having seen the V-shaped drainage ditch that ran parallel to the shoulder nor did he notice the gap in the berm. A few feet after he passed the reflective paddle, plaintiff's left foot dropped into the drainage ditch and he fell and broke his leg.

Plaintiff sued County on two causes of action: dangerous condition of public property (§ 835) and employee negligence (§ 815.2). The trial court granted County's motion for summary judgment. This appeal followed.

II. LEGAL FRAMEWORK AND STANDARD OF REVIEW

A public entity may be liable for negligently creating a dangerous condition of public property. (§ 835, subd. (a).)[2] A dangerous condition of public property is one that

[2] Section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the (continued)

"creates a substantial risk of injury when the property is used in a foreseeable manner with due care." (*Cameron v. State of California* (1972) 7 Cal.3d 318, 323 (*Cameron*); § 830, subd. (a).) Where it applies, section 830.6 protects a public entity from liability for a dangerous condition of public property.[3] To paraphrase that statute, a public entity is immune from liability for injury caused by a plan or design of an improvement to public property if: (1) there is a causal relationship between the plan or design and the accident; (2) the legislative body of the public entity or an authorized public employee approved the plan or design prior to construction; and (3) substantial evidence supports the reasonableness of the plan or design. (*Higgins v. State of California* (1997) 54 Cal.App.4th 177, 185, abrogated on another point in *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 67.) When a defendant moves for summary judgment based upon section 830.6, the defendant has the burden of producing evidence on each of these three elements. Once the defendant does so, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists. (Code Civ. Proc., § 437c, subds. (a), (p)(2).)

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scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

[3] In pertinent part, section 830.6 provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design . . . or (b) a reasonable legislative body or other body or employee could have approved the plan or design."

On appeal from summary judgment granted on the basis of the design immunity defense, "the appellate court examines the facts presented to the trial judge and independently determines their effect as a matter of law . . . . [Citation.]" (*Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 596.)

III. THE MOTION FOR SUMMARY JUDGMENT

A. County's Moving Papers

The dangerous condition of which plaintiff complains is the abrupt steepness and depth of the drainage inlet and ditch and their location next to the shoulder of the road. In support of its contention that the design of these improvements was subject to the design immunity defense, County submitted the declaration of John Swenson, a registered civil engineer and the senior civil engineer in County's Department of Public Works Road Maintenance Operations Division. Swenson declared that the drainage improvements at issue were part of the 1980 design for Loma Del Mar Tract No. 1028, a planned unit development built along Seacliff Drive, and were installed in or around 1981. Swenson explained that the slope of Seacliff Drive in the area of the accident was about 13.5 percent. The drainage improvements were necessary to prevent uncontrolled flows of surface water that could imperil motorists and to prevent flooding at the bottom of the hill.

Swenson interpreted the Loma Del Mar Improvement Plan–Final Map (the plans), which is part of the record on appeal. The plans "include an approximately four-inch berm along the side of Seacliff Drive, [and] an approximately ten-foot opening or gap in the berm. The gap in the berm and the contour of the road surface and the steep declination of the roadside drainage ditch are designed to direct maximum surface flows into a drain inlet which opens about 2.5 feet below the road surface to carry surface water down the steep hill. . . . The angle created by the opening in the berm facilitates the collection of a greater volume of water from the road surface." According to Swenson, the "drain inlet, the berm configuration and the roadside ditch were all reflected in the

design plans for the [1980] improvement of Seacliff Drive." The plans contained in the record include location and construction specifications for the drainage improvements, and elevations for the road and the improvements.

The plans were signed off by County's Director and Assistant Director of Public Works, both of whom were registered engineers. Once the improvements were completed, County's Board of Supervisors formally accepted the improvements as complete in accordance with the previously approved plans.

Swenson opined that the improvements were reasonable and necessary to prevent flooding, that it was good and accepted engineering practice to provide such inlets at regular intervals along a roadway; and that construction and placement of the subject drain inlet was consistent with Cal Trans and County standards in effect at the time.

B. Plaintiff's Opposition

Plaintiff did not dispute any of the foregoing facts. Plaintiff did submit the declaration of a safety engineer and copies of local citizen complaints to support his contention that the drainage improvements posed a substantial hazard to pedestrians.

Plaintiff's engineering expert, Charles J. Samo declared that a "sudden and unexpected change in elevation of over 2 feet at the side of the roadway shoulder used by pedestrians cannot be merely dismissed as a trivial defect." Samo opined that safe drainage design for roadside ditches requires ditches to be flat shaped rather than V-shaped. He stated that Cal Trans standards do not allow "V-type roadside ditches with excessive depth to be located adjacent to a roadway's shoulder where pedestrians are expected to use." Samo did not identify by name or date the Cal Trans standards to which he referred nor did he define "excessive depth." He did not dispute Swenson's declaration that the design and construction of the drain inlet and ditch conformed to the standards in effect when they were built or that the improvements were reasonable and necessary to prevent flooding and the uncontrolled flow of surface water across the road.

Plaintiff's evidence of neighborhood complaints ranged from neighbors' letters asking for debris to be cleared from various drainage inlets to complaints about the speed of traffic along Seacliff Drive and the danger the traffic posed to pedestrians. There was no evidence that anyone other than plaintiff had suffered an injury caused by the drainage improvements along Seacliff Drive.

C. The Trial Court's Ruling

Although not included in the order granting County's motion, the trial court noted during the hearing on the motion that there was a triable issue on whether the condition of which plaintiff complained was in fact a dangerous condition of public property. The court concluded, however, that County had established its right to immunity under section 830.6 and there was no triable issue as to plaintiff's first cause of action. The court further held that general negligence principles would not suffice to establish liability on plaintiff's second cause of action for employee negligence.

IV. DISCUSSION

A. Design Immunity

Plaintiff challenges each of the elements of County's design immunity defense. We deal briefly with several of his arguments.

First, plaintiff contends that the design immunity defense does not apply because County did not design or construct the drainage improvements. This argument is unavailing because there is no such requirement in the statute. (§ 830.6.)

Plaintiff also argues that since the alleged design defect was intended to collect surface water runoff, and he was not injured by runoff, County failed to show that the design was responsible for his injury. Plaintiff has confused the analysis. The purpose of the design is not material. The question is whether the design features (the gap in the berm, the depth of the drainage ditch) caused his injury. (See *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 570, 575.) There is no question that these features were at least a contributing cause of plaintiff's broken leg.

Plaintiff attacks the second element of the defense (discretionary approval) by arguing that when County approved the plans, it did not consider the injury-producing features of the design, that is, the depth and steepness of the drainage inlet. As plaintiff correctly points out, the injury-producing aspect of the design must have been considered and approved in order for the defense to apply. (*Cameron*, *supra*, 7 Cal.3d 318.) But plaintiff's argument ignores the evidence. The approved plans contained in the record plainly depict the location of the drain inlet, the inlet elevations, and cross sections of the road, i.e., the depth and steepness of the drainage inlet.

Plaintiff's final argument on the design immunity issue is that County did not present substantial evidence of the reasonableness of the design because County did not take into consideration pedestrian safety. Plaintiff's argument fails to acknowledge that analysis of the reasonableness element does not focus on whether the design was actually reasonable; it focuses on whether ". . . a reasonable public employee [or legislative body] could have adopted the . . . design . . . ." (§ 830.6.) "We are not concerned with whether the evidence of reasonableness is undisputed; the statute provides immunity when there is substantial evidence of reasonableness, even if contradicted. [Citations.]" (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940, fn. omitted.) The opinion of a competent professional is ordinarily enough to establish the reasonableness element and shift the burden to the plaintiff to establish a triable issue of fact. (*Higgins v. State of California*, *supra*, 54 Cal.App.4th at p. 187.) Plaintiff's evidence is insufficient if it merely contradicts defendant's expert on the reasonableness issue.

This low evidentiary threshold is deliberate. "The rationale behind design immunity 'is to prevent a jury from simply reweighing the same factors considered by the governmental entity which approved the design.' [Citation.] ' "[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable [persons] may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public

officials in whom the function of making such decisions has been vested." ' " (*Cameron*, *supra*, 7 Cal.3d at p. 326.) But this low threshold does not mean that any evidence will support the reasonableness element. In order to be considered substantial, the evidence must be of solid value, which reasonably inspires confidence. (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 757.)

Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789, 799-800, (*Davis*), upon which plaintiff relies, does not assist him. In *Davis*, the defendant designed and constructed a park with a lake in it. The lake was shallow and was included primarily for its visual appeal but also to provide a fishing experience for children. Since fish could not survive in a shallow lake during the summer, the lake had to include a deep hole where the fish could shelter when it was hot. (*Id.* at pp. 792-793.) The lake was ultimately constructed with a shallow lakebed that dropped off abruptly to a deep fish hole in the middle. A young child who waded into the lake fell into the hole and drowned. (*Ibid.*) The defendant's evidence in support of its design immunity defense was that since the lake was primarily intended to be esthetic, it was not reasonably predictable that persons would venture near the fish hole. (*Id.* at pp. 797-798.) The appellate court concluded that this was not substantial evidence to support the reasonableness element. (*Id*. at p. 799.) The *Davis* court's view was that since the park as a whole was intended to be a recreational focal point for children and was surrounded by residential neighborhoods, ball fields, and an elementary school, no reasonable legislative body could have approved the dangerous fish hole design. (*Id*. at p. 798.) That is, the defendant's evidence that it was not reasonably predictable that persons would venture near the fish hole had no solid value in the circumstances.

In contrast, the alleged danger here was part of a design that was intended to collect storm water, to protect motorists, and to prevent flooding at the bottom of the hill. The design conformed to the standards in effect at the time. The injury-producing aspects of the improvements were not hidden like the fish hole was. And although there

was no evidence that the improvements were designed with pedestrians in mind, the improvements were not located where people were invited to walk; they were located off to the side of the three-foot shoulder. In our view, this is sufficient evidence upon which a reasonable public employee or legislative body could have approved the design.

To summarize, the trial court was correct in concluding that County had established the elements of the design immunity defense.

B. Lack of Lighting or Warning Signs

Plaintiff next argues that design immunity does not apply to County's negligence in failing to illuminate the area or post signs warning of the presence of the drainage improvements.[4] County had no duty to do either.

The general rule is that in the absence of a legislative provision to the contrary, a public entity is under no duty to light its streets and failure to do so is not actionable negligence unless some peculiar condition makes lighting necessary for safe travel. (*Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 483.) In our view, the improvements in question were not so unusual they should have been illuminated; they were the types of improvements one would expect to find along the roadside. The mere existence of a drainage inlet box and its associated drainage ditch does not require a streetlight. To hold otherwise would require County to illuminate every storm drain and culvert in its jurisdiction. Even plaintiff's expert did not suggest that lighting was necessary.

County is also immune from failure to post warning signs, markings or devices. (§ 830.8.) County may be liable only if such warnings are "necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not

[4] County argues that the drainage improvements did not constitute a dangerous condition and did not require any warnings. Because the trial court did not decide the motion based upon the lack of a dangerous condition, we have presumed for purposes of this appeal that there was a triable issue on the point.

be reasonably apparent to, and would not have been anticipated by, a person exercising due care." (*Ibid.*) This exception to the immunity conferred by section 830.8 is referred to in the cases as the "trap" exception. (*Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th at p. 945.)

Where the public entity has created a trap that is covered by the design immunity of section 830.6, the public entity may still be liable for failure to warn where that failure is negligent and is "an independent, separate concurring cause of the accident." (*Cameron*, *supra*, 7 Cal.3d at p. 329.) This exception to design immunity is best explained by referring back to the conditions for liability. Section 835 provides that a public entity is liable for injuries caused by a dangerous condition that it created (§ 830.6, subd. (a)) or by a dangerous condition of which the public entity had actual or constructive notice. (§ 835, subd. (b).) Section 830.6 provides immunity from liability in the first instance (where the public entity created the dangerous condition) but it does not apply in the second instance (where the public entity fails to protect against a dangerous condition of which it has notice). (*Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 810-811.) Actual notice means that the public entity had actual knowledge of the existence of the condition and "knew or should have known of its dangerous character." (§ 835.2, subd. (a).) A public entity has constructive notice if "the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (*Id*. at subd. (b).) To summarize, a public entity may be liable for failure to warn of a dangerous condition that is otherwise subject to the design immunity defense only if the dangerousness of the condition is not reasonably apparent to a careful user and the public entity has actual notice of the dangerousness of the condition or the dangerousness is so obvious that the public entity should be charged with constructive notice.

Although plaintiff bases his argument on appeal on the holding in *Cameron*, *supra*, plaintiff incorrectly argues that *Cameron* does not require the defect to be hidden

in order for County to be liable for failure to warn. In pressing the argument he effectively admits that the dangerous condition *was* reasonably apparent, an admission that is amply supported by his own testimony and the photographs contained in the record.

Furthermore, the record contains no evidence from which a jury could conclude that County had notice that the condition was dangerous. *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 243 held that the absence of injuries related to certain beach fire rings during the five years the fire rings had been used meant that the defendant had no notice of their alleged dangerousness, actual or constructive. The absence of injuries in this case is equally persuasive. The improvements were constructed in the 1980's. In the years that followed, neighbors wrote to County complaining that vehicle traffic on Seacliff Drive had increased and that the speed limit was too high. Neighbors concerns about pedestrian safety related to the peril posed by vehicular traffic. There was no evidence that anyone perceived the drainage inlets and their associated drainage ditches to be a risk to pedestrians. Significantly, there was no evidence that any pedestrian other than plaintiff suffered an injury attributable to the drainage improvements in the approximately 19 years since they were constructed. In short, since the drainage improvements were open and obvious and County had no notice of their alleged dangerousness, County cannot be liable for failure to post warning signs.

C. Employee Liability

The public entity is liable for its employees' negligence unless there is a statute granting the employee immunity. (§ 815.2.) The immunities provided by both section 830.6 (design immunity) and 830.8 (immunity for failure to warn) expressly apply to public employees. Thus, County cannot be liable for its employees' conduct to the extent it is encompassed by these immunities.

Furthermore, a public employee may be liable for injuries arising from a dangerous condition of property only if the employee had the means and the authority to

act upon the condition and the dangerous condition was either directly attributable to an act of the employee or the employee had actual or constructive notice of the dangerous condition. (§ 840.2.) Absent proof of these prerequisites to liability, public employees are not liable for injuries caused by a dangerous condition of public property. (§ 840.) Plaintiff's second cause of action is based upon the same facts as his claim against County and he alleges no facts to support a finding of liability under section 840.2. The trial court was, therefore, correct in concluding the plaintiff's second cause of action presented no triable issue of fact.

V. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.